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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 400

SAMUEL BOBBINS,

Appellant,

v.

THE STATE OF NEW JERSEY,

Appellee.

Appeal from the Supreme Court of

New Jersey

STATEMENT AS TO JURISDICTION

AND APPENDICES

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Appeal from the Supreme Court of the State of New Jersey

STATEMENT AS TO JURISDICTION

This isan appeal from a judgment of the Supreme Court of New Jersey, entered on April 23, 1956, affirming a judgment of conviction for the crime of embezzelment by agent, in violation of the N.J.S. 2A:102-5, by Atlantic County Criminal Court, on May 26th, 1954.

OPINION BELOW

The opinion and judgment of the Superior Court of New Jersey, Appellate Division, is reported in 35 N.J. Super. 494, and is set forth in Appendix A p.13). The opinion and judgment of the New Jersey Supreme Court rendered on April 23, 1956 is set forth in Appendix B p.22).

JURISDICTION

The judgment appealed from is from the highest court of the State of New Jersey. The Notice of Appeal to this Court was served on Appellee and, with acknowledgment of service, was filed with the Clerk of the Supreme Court of New Jersey, on July 12,1956.

The jurisdiction of this court is invoked because the highest court of New Jersey has upheld and sustained a criminal statute of New Jersey (N.J.S. 2A:102-5) on embezzelment, as herein set forth in Appendix D p.25) which statute was attacked and alleged to fail in charging a crime and also in that it was so vague and indefinite as to be repugnant to the Fourteenth Amendment to the Constitution of the United States. Furthermore, the alleged act of appellant was charged to have been committed thirty days prior to the effective date of said criminal statute, and therefor, as to this appellant, said act and the indictment thereunder, set forth in Appendix C p.24) is repugnant to and contravenes both the New Jersey and United States Constitution as being an ex post facto law.

Pending the appeal from Appellate Division to the New Jersey Supreme Court, because of a federal indictment against Miller, the State's complaining witness (with reference to false swearing in an FHA matter, i.e., this same Mayfair Apartments,Inc.) a motion to remand was made and granted for purpose of taking testimony on newly discovered evidence, which was denied by the trial judge, although pertinent facts were introduced (and not controverted) which materially bear upon the lack of a criminal intent on the part of the appellant and lends credence to the true underlying reason why claimant gave appellant permission to use those funds, and, together with the original testimony at time of trial, clearly shows that the State did not prove the guilt of the appellant beyond a reasonable doubt and therefore deprived him of his liberty.

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The jurisdiction of this Court for this review is conferred by Title 28 of the United States Code #1257 (2).

The following decisions sustain the jurisdiction of this Court to review on direct appeal said judgment of the New Jersey Supreme Court.

CALDER v BULL, 3 Dall, U.S. 386, 1 L. Ed. 648- No State shall pass any ex post facto laws. C.J.S. #435 et seq.

LANZETTA v NEW JERSEY, 306, U.S. 451, 83 L. Ed. 888, 59 S. Ct. 618, 647.

CONNALLY v GENERAL CONSTR. CO. 269 U.S. 385,391, 70 L. Ed. 322, 328, 46 S. Ct. 126.

In any event, if appeal is not proper, then this should be treated as a Petition for Writ of Certiorari, under Title 28 USC #2103.

QUESTIONS PRESENTED ON THIS APPEAL

Appellant was indicted under N.J.S. 2A:102-5 for allegedly embezzeling money, as the agent of Mayfair Apartments, Inc. between the 1st day of December 1951, and the 5th day of May, 1953, without specifying any certain day or dates, nor sum or sums of money, only the aggregate amount.

N.J.S.2A:102-5 became effective on January 1st, 1952, and therefore there is a 30 day period prior to such effective date of the very act under which he was indicted, for which he is charged in such indictment and subsequently convicted, as to make this statute, as to this appellant, ex post facto. Under paragraph 4 of this same act (N.J.S. 2A:102-4) all of Title 2 of the Revised Statutes of New Jersey was repealed (see Appendix D) so that there was no other act covering such situations, and although there was an old act covering such situations, same was ipso facto repealed by this same 1951 Act, and therefore such act was innocent in point of law.

The wording of N.J.S. 2A:102-5 was so vague and indefinite as to be repgnant to the Fourteenth Amendment to the United States Constitution. The indictment (Appendix C p.24) failed to charge a crime under this act.

The state did not prove the guilt of the defendant beyond a reasonable doubt.

The questions presented on this appeal are:

1. Is the Act, N.J.S. 2A:102-5, and the indictment thereunder under which appellant was convicted, ex post facto as to this appellant, where the effective date of its enactment was 30 days <u>after</u> the alleged commission of his deeds, contrary to the United States Constitution as well as the New Jersey Constitution, Art. 4, #7, par. 3- "The Legislature shall not pass any bill of attainder, ex post facto law,etc.***" ?

2. Is the Act, N.J.S. 2A:102-5 vague and repugnant to the Fourteenth Amendment of the United States Constitution in that it fails to set forth with sufficient particulars just what the State commands or firbids to be done, and does it compel a citizen to speculate as to the meaning of penal statutes?

3. Has the State proved the guilt of the defendant beyond a reasonable doubt, bearing in mind the facts presented to the jury, the refusal of the trial judge to permit certain testimony to be introduced by appellant, as well as the uncontroverted facts produced on the hearing on the motion for a new trial, all of which negatived any criminal intent on the part of the appellant, and lent credence to the true agreement between complaining witness and appellant, bearing in mind the various considerations appellant surrendered in turning the original deal over to complaining witness?

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Samuel Bobbins, the appellant, promoted the building of an apartment house under the F.H.A. on a parcel of land in Atlantic City, New Jersey, owned by one, Kauffman, and originally contacted Anthony P. Miller, as a prospective builder of same, but when the original sponsor could not qualify as to financial responsibility, etc, Miller proposed that he take over the entire deal, as sponsor, owner and operator of same. There were certain fringe benefits, such as commissions and rebates for finder's fees from mortgagee, architect, (which amounted to $18,900 from each), plus $10,000 finder's fee promised by Miller himself if he obtained the builder's contract, plus a 32 year management contract at 5% commission, which would amount to about $15,000 per year (or an overall $500,000) for the life of the contract) plus the fact that Bobbins laid out about another $30,000 in out of pocket expense in putting this deal together (options, rental money, preliminary architect and mortgagee fees, lawyer's fees,etc.). When Bobbins raised these questions,Miller is alleged to have said "go along with me, leave it to me, and everything will work out all right." When Bobbins told Miller he incurred several thousands of dollars in putting the deal together and would need some money now, Miller is alleged to have said to go along with him and that Bobbins could sue some of the money (advance rent money as well as current rentals) so long as he used reasonable sums and put them back into the account. Accordingly, Bobbins turned the deal over to Miller, and used some of this money. Bobbins constantly maintained that Miller knew about this and gave him such permission and furthermore, indicated such usages of the rentals by making a notation in the monthly rental statements submitted to Miller opposite the specific apartment unit rental (i.e. Rental of Apt 2A--"To be reported"). However, some time later, when Miller alleged he first knew of such shortages, the accountants were called in, and the short-

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ages in the accounts were alleged to run to $88,785.44. Appellant was indicted and convicted of embezzelment and sentenced to 12 months to 18 months in New Jersey State Prison. Appellant appealed to Superior Court, Appellate Division, and then to the New Jersey State Supreme Court.

WHERE FEDERAL QUESTIONS RAISED

Pending the appeal from Superior Court, Appellate Division to the New Jersey Supreme Court, a motion to remand the case back to the Atlantic County Court, was made and granted by the Supreme Court of New Jersey on December 5th, 1955, for the purpose of making application for a new trial upon the grounds of newly discovered evidence (see D 74 Supp. App. N.J. Supreme Court) and at the same time, on December 23, 1955, motion in arrest of judgment was argued before the trial judge raising for the first time, the question of appellant's being convicted under an ex post facto law as to him. This point was raised in our petition for leave to remand, although the order of the New Jersey Supreme Court remanded the case for the purpose of making motion for new trial on newly discovered evidence. This newly discovered evidence was chiefly predicated upon a new federal indictment of the State's complaining witness with regard to false swearing in relation to the FHA authorities in connection with this same Mayfair Apartments, Inc. which opened the door to some 78 pages of testimony and exhibits which appears in the Transcript under the heading of "Supplemental Memo and Supplemental Appendix on Behalf of Defendant-Appellant, in the Suprme Court of New Jersey.

However, the order made by the trial judge denying my motion to arrest judgment of conviction was based on the fact that "the defendant was convicted on May 26, 1954, as a consequence of which the aforesaid Motion is made more than ten (10) days after the verdict of guilty, and the Court being satisfied that the ends of justice will

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not be thereby subserved" (by trial judge, George T. Naame, J.C.C.).

On appeal to the New Jersey Supreme Court, this question was raised but in the opinion affirming the denial of such motion, the court, in a per curiam opinion stated that "R.S. 2:124-11,which the present statute supercedes, was in effect in December, 1951, and proscribed the acts which the jury found defendant had committed."etc. But the New Jersey Supreme Court fa ls to take into consideration paragraph 4 of the enactment of this same 1951 Revision Act (N.J.S. 2A:102-4) which specifically repealed Title 2, its amendment and supple ments. Having been repealed by the same new act, the old law (R.S. 2:124-11) was no longer in effect and to all intents and purposes, only this new law, N.J.S. 2A:102-5 was operative. This fact was overlooked by the New Jersey Supreme Court, and brings this case within the constitutional prohibition as an ex post facto law as to this appellant.

On appeal to the Supreme Court, Appellate Division, the question was raised (a) that the indictment failed to charge a crime under N.J.S. 2A:102-5 or under any other statute, law or the common law, and (b) is void as vague and indefinite and therefore repugnant to the Fourteenth Amendment to the United States Constituion. (See Def. Brief p.6 Appellate Division). Objection taken to the use of the word "embezzels" to define the very crime itself of embezzelment, and the construction of the wording "receives property", etc. Distinction was poin ted out in prior cases where the court made a distinction between "money" and "property" (citing BURNETT v STATE, 60 N.J.L. 255, 37 A. 622). However, the Appellate Division held the word "embezzels" connotes a settled significance in the law, and the Court, in attempting to justify the indictment by holding that the word"property" embraced "money" went on to explain the word "received" but did not satisfactorily show how "money" was embraced in the word "property". The New Jersey Supreme Court affirmed the opinion below

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without expressing any thought on this point. However, there must have been some doubt on this point for the New Jersey Legislature, on March 19th, 1953 (long after our appellant's first deed commenced) adopted an Amendatory Act defining Words and Phrases (L.1948 c 4 p. 47; L. 1953, c.4 p.18) by which Act, among other definitions, the word "personal property" was specifically designed as including "money". This was even pointed out in Respondent's brief p. 8, in the New Jersey Supreme Court. But Bobbins was convicted for having "received money, as agent, between December 1st, 1951 and the 5th day of May, 1953" - - - -a period long before the Legislature decided that there was some doubt or distinction and proceeded to clarify this statute, but that definition applies in futuro.

The Supreme Court of New Jersey did not express its opinion on these points either, and we contend that "no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or firbids. And a statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess of its meaning and differ as to its application, violates the first essential of due process of law."- cited in CONNALLY v GENERAL CONSTR. CO. 269 U.S. 385, 70 L. Ed. 322, 328, 46 S. Ct. 126, which was quoted by Appellantin the Appellate Division in his Brief there at p. 13.

The point involved is such that it involves the violation of the Fourteenth Amendment of the United States Constitution in that it deprives the defendant of his liberty without due process of law.

The third question is founded on the fact that the State did not prove the guilt of the defendant-appellant beyond a reasonabledoubt.

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This point was raised at the trial, by objections to testimony, by refusal to permit certain testimony, on appeal to the Appellate Division, Superior Court, and on Appeal to the New Jersey Supreme Court, with special emphasis on Court's refusal for a new trial based upon newly discovered evidence, especially since none of this was controverted and sheds light on the true transaction here and points up the appellant's difficulty in bringing all of this evidence before the trial judge, who certainly would not have found a guilty verdict were there was no criminal intent, but specific prior permission to use such funds; and a failure to permit such evidence to go before the jury certainly deprived the defendant-appellant, of due process.

ARGUMENT

A. The N.J.S. 2A:102-5 is ex post facto as to this appellant.

There was a 30 day period prior to the effective date of its enactment when the appellant was alleged to have committed an offense. All prior embezzelment statutes were repealed by this same new revisionary act--and therefore made such alleged conduct innocent at law.

This defect was apparent upon the face of the record and the trial court of the New Jersey Supreme Court should have granted the motion in arrest of judgment, since such judgment of conviction is a nullity upon its face. Under the New Jersey R.R. 3:7-13 the court may correct an illegal sentence at any time.

B. The very wording of this indictment failed to charge a crime under N.J.S. 2A:102-5.

Embezzelement was not a crime at common law--only made so by statute. Strict construction and annalysis of this statute raises the question of "embezzels" -"take money"--"receives personal property". See point I -Appellant's Brief, App. Div. p.6-12.

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C. N.J.S. 2A:102-5 is void as vague and indefinite - - and therefore repugnant to the Fourteenth Amendment to the Constitution of the United States.

The use of the word "embezzels" to define the crime --embezzels what?---from whom? All of this left to conjecture. See Point II Appellant's Brief App. Div. p. 12-15.

D. State failed to prove guilt beyond a reasonable doubt.

Claimant allowed appellant credit for 5% commissions on collections of the rent in computing his alleged shortages--showing this was not an embezzelment --nor a faithless servant.

Evidence failed to show that claimant ever paid appellant any monies for collecting rent for over 6 months. Appellant was under no obligation to work gratis for claimant. This goes to prove that there was an understanding and such an agreement and permission to use such funds as claimed by appellant and negatived any criminal intent.

Admission that appellant repaid some $20,000 to the account. Acknowledgement of receiving monthly reports from the appeallant regarding collection of rents, with words "to be reported" after blank spaces where amounts collected should be shown--for over 10 monthly reports.

Trial Court's refusal to permit cross-examination of complaining witness with respect to the FHA commitment, and their dealings (see trial testimony D56a, D61a) so that the jury could have the benefit of showing the agreement entered into between complainant and appellant, showing permission to use those funds, was as the appellant claimed, and threfore a lack of any criminal intent.

Trial Court's refusal to go into the question of appellant's part in the making of the original deal, etc. and showing

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the various fringe benefits as the consideration appellant gave up when turning over this deal to Miller, would warrant Miller's making such promise for permission to use some of the funds (D.s.a.60-61).

Trial Court's refusal to permit appellant to testify to facts set forth in an offer of proof (letter to bonding company) (antedated the date Miller first alleged he found discrepancies but notwithstanding Miller retained Bobbins for over two more months permitting him to keep on collecting funds)--this would have shown this to be a loan transaction and not an embezzelement (trial testimony D 233z-26).

Trial Court's refusal to permit appellant's attorney to testify to matters brought out on cross-examination with regard to certain statements (admissions) made by appellant (D 192a-10,14).

Testimony brought out on the motion for new trial (D. s.a. 5-7) showed complaining witness used advance rents for construction purposes contrary to FHA regulations, and so admitted by its secretary-- lends credence to such an understanding between Miller and Appellant.

Complainant stated he would be satisfied with status so long as there was sufficient money to pay for carrying charges (D23a-12,18) although he denied this later, yet, on hearing for the motion for new trial, it developed that only Miller, the complainant, could make withdrawals against these bank accounts and he made several of them for personal account (one check for $151,104.33)-see D 49 s.a. 22) - such shortages in the accounts could very well have been brought about by Miller's own withdrawals for personal purposes.

Many jurisdictions hold that there cannot be an embezzelment between creditor and debtor relationsyip (18 Am. Jur. "Embezzelment" Sec. 20) although the Appellate Division followed the Kentucky view, there is authority to the contrary.

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CONCLUSION

That this Court should review the decision of the New Jersey Supreme Court is madatroy, since:

1. Jurisdiction exists pursuant to Title 28 United States Code, Section 1257 (2); and

2. The question presented is substantial since it affects the liberty of appellant, contrary to the ex post facto feature of the United States Constituion as well as under the Fourteenth Amendment thereof.

This Court should note probable jurisdiction, direct that briefs on the merits be filed and that the cause be scheduled for oral arguments.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A 70-54

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

SAMUEL BOBBINS,

Defendant-Appellant.

Argued May 9, 1955. Decided May 23, 1955.

Before Judges, Clapp, Jayne and Francis.

Mr. David Brone, First Assistant Prosecutor, argued the cause for the Respondent.
(Mr. Lewis P. Scott, Atlantic County Prosecutor, Attorney).

Mr. Edward I. Feinberg argued the cause for the Appellant.
(Messers Malandra & Tomaselli, Attorneys: Mr. Jpseph Thomaselli, of Counsel.)

The opinion of the Court was delivered by

FRANCIS, J.A.D.

Defendant was convicted of embezzelment under an indictment which charged that,

"on divers days between the 1st day of December, 1951, and the 5th day of May, 1953, being the agent of Mayfair Apartments, Inc., a corporation of the State of New Jersey, his principal, and as such agent entrusted with the care and collection of rent moneys and payments due to such corporation, and having as agent received, collected and obtained from tenants of said corporation the sum of $88,785.44, the property of the said Mayfair Apartments, Inc.**(he) did wilfully, unlawfully and feloniously retain and appropriate to his own use the said sum of money aforesaid, knowing the same to belong to the said Mayfair Apartments, Inc.**with intent to defraud the said Mayfair Apartments, Inc.* contrary to the provisions of N.J.S. 2A:102-5***"

It is argued that the statute on which the indictment is

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[illegible] and consequently repugnant to the Fourteenth Amendment to the Federal Constitution. More specifically it is claimed that a penal statute creating a new offense must be explicit in its description of the conduct proscribed and that due process is violated where its terms are so vague that men of common intelligence must guess at the meaning. LANZETTA v NEW JERSEY, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939).

N.J.S. 2A:102-5 became effective in its revised form on January 1st, 1952 (L. 1951, c. 344). It provides:

> "Any employee, agent, consignee, factor, bailee, lodger or tenant who embezzels, or, with intent to defraud, takes money or receives, retains or appropriates to his own use or the use of another, any property or the proceeds of the sale of the same, or any part thereof, belonging to his employer principal, consignor, bailor or landlord, is guilty of a misdemeanor."

The suggestion is that use of the word "embezzels", which did not signify a crime at common law, without specific definition as to what is being made criminal, renders it necessary for the public to speculate about the nature and elements of the crime. Further it is said that in the context "embezzels" stands alone disconnected from the remainder of the sentence, so that no answer is provided for such question as: "Embezzels what?" and "Embezzels from whom?"

We find no legal merit in these criticisms. Although the construction and perhaps the punctuation of the sentence could be improved, the implication is plain/ far as the present case is concerned. An employee, agent, consignee, factor, bailee, lodger or tenant is guilty of embezzelement if (a) he embezzels money belonging to his employer, principal, consignor, bailor, or landlord, or (b) if with intent to defraud he takes money belonging to his employer, principal, consignor, bailor or landlord that has come into his possession lawfully.

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[illegible] the connotation of the word "embezzels" is obvious: It has a settled significance in the law from the time of the first judicial declamation that conversion or misapprpriation of money or property of an employer or principal by a servant or agent which has been entrusted to him by another, did not constitute common larceny. Since then embezzelment has meant generally the intentional and fraudulent appropriation of the property or money of another by a person into whose hands it had lawfully come or to whom it had been entrusted. STATE v CARR, 118 N.J.L. 233 (E & A.1937); STATE v WOODWARD, 99 N.J.L. 49 (S.C. 1923); STATE v EGAN, 84 N.J.L. 701 (E & A.1913); 29 C.J.S. Embezzelment. #1: Wharton, Criminal Law, (12th Ed. 1932) 1568, #1258: 2 Burdick, The Law of Crime (1946) #562; Webster's New International Dictionary. The definition was so well known that in 1529 the first statute known to deal with such breach of trust made it a felony for any servant to "embesill" his master's caskets, jewels, money, goods, or chattels or any part thereof, above the value of forty shillings. 21 Henry VIIII,ch 7; Coke's Institutes, Vol. 3. p.105.

It has been said that the single word "embezzle" in an indictment contains within itself the charge that the defendant fraudulently appropriated the mony or property to his own use. People v Catcott, 393 Ill. 582, 67 N.E. 2d 175 (Sup. Ct. 1946); State v Hudson, 93 W. Va. 435, 117 S.E. 122 (Sup. Ct. of App.1923); 2 Burdick, supra, #585.

Next it is claimed that the indictment fails to charge this statutory crime. Again we find lack of substance.

Defendant points to the allegation of the indictment that he "received, collected and obtained" from the tenants of Mayfair Apartments, Inc. "the sum of $88,785.44" and "did wilfully, unlawfully and feloniously retain and appropriate" it to his own use. And he says that since the statute uses the word "receive" only in

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connection with "property" which, in the context, must be distinguished from money, it is not made a crime to receive money and appropriate it to one's own use. But in the indictment "received" is a factual statement intended to explain how the money came into Bobbins's hands. In other words, the State alleged that he was the agent of Mayfair Apartments, Inc., for the purpose of collecting rents from its tenants, that because of the finduciary relationship he received (became entrusted with, came into possession of) the money in question and that he wilfully and unlawfully appropriated it to his own use. This asserts a classical case of embezzelment.

Reversal is sought also because of the refusal to grant the motion for judgment of acquittal and because the verdict of guilty is said to be contrary to the weight of the evidence. Consideration of these contentions requires a statement of the facts.

Bobbins held some options on an assembled parcel of land in Atlantic City which was adaptable to apartment house construction. One Kauffman had an F.H.A. mortgage commitment for such a structure. However, the two men were unsuccessful in their efforts to promote and finance the project. Ultimately and withtheir assistance, Anthony P. Miller acquired the commitment. This involved a payment of $13,000 so far as Bobbins' interest was concerned. He received about $4,000 personally and the remaining $9,000 was paid to certain of his creditors. In addition, an agreement was made that he would be appointed rental manager of the apartment house project at a commission of 5% of the rentals.

Miller then organized the Mayfair Apartments, Inc. of which he became the president and principal stockholder. Bobbins was appointed rental agent by written contract signed by Miller as president. It was for a term of two years but had been renewed until December 31, 1953. The 5% commission was provided for and the rents upon collection were to be deposited in a special Mayfair bank account.

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in the rental account to meet operating expenses and Miller had to advance $12,000 to prevent the corporation from becoming in default. On inquiry, Bobbins gave as the reason that a number of the tenants were in the South on vacation and that he would collect the delinquent rents when they returned in March or April. In March the deposits did not increase and the auditors, who apparently were engaged in the annual audit for 1952, informed Miller of the discovery of a $45,000 shortage in the rental account. He wrote Bobbins advising him of the serious nature of the matter, and that he would have to notify the bonding company. Bobbins replied by letter reiterating the earlier statement that a large percentage of the tenants were summer residents who had not been occupying the apartments in the cold weather but who might be expected to return after March 15. He enclosed also a copy of a form letter which he said he was being sent to those tenants who were in default in their rent.

The audit continued and ultimately revealed a total shortage of $100,244.59. This sum, less 5% commission, left a definit of $88,785.44, the amount charged in the indictment to have been embezzeled. Bobbins admitted the shortage and that he had received rents representing that amount plus his 5% commission, and had used the money for his own purposes. He was discharged on May 5, 1952.

The defense was that the $88,785.44 represented a form of loan and not a criminal defalcation. Defendant asserted that after the agency contract had been made, he told Miller about financial obligations he had incurred in the course of his original efforts to accomplish the apartment construction. He said that Miller was told also of certain moneys he was to receive, such as a "kickback" from the architenct's fees amounting to $40,000. As a consequence

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an understanding was reached that Bobbins would collect certain rents in advance from the tenants, and that he would use these moneys within reason in connection with an independent operation of his own, so long as the Mayfair Apartment accounts and obligations were kept current. It must be said that the testimony with respect to this understanding, which was specifically and emphatically denied by Miller, was most ambiguous and the description of the nature of the loan and how repayment was to be made was most tenuous. And the assertions of the defendant on the subject stood alone.

After the discovery of the shortages, there were meetings with representatives of the bonding company and others and at no time did Bobbins assert the loan scheme. On these occasions Bobbins admitted using the money and said he would pay it back. He never claimed it was a loan or that it was used with permission. Miller's attorney said that in one conference with him defendant admitted that he had no right to take the money. There was considerable evidence that at one of these conferences Miller called Bobbins a "no good theif" to which he made no answer. At another, according to an accountant who was a witness, defendant's own attorney (not trial counsel) said in Bobbins's presence that "he could not prevent Mr. Bobbins from going to jail, but that if he were allowed time he felt this matter could be worked out and restitution made or the funds returned.".

Enough has been detailed to demonstrate that the issue of whether a debtor and creditor relationship existed between the defendant and Mayfair Apartments, Inc. or whether Bobbins was an embezzler, was for jury determination and that the trial court did not err in refusing to acquit. Likewise it is equally plain that the verdict of the jury was not contrary to the weight of the evidence. The record reveals more than ample evidence to justify the conclusion.

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The further argument is advanced that a person cannot be convicted of embezzelment if he has an interest (such as Bobbins' 5% commission interest) in any part of the converted money. If the funds are not entirely the property of another, it is urged that the crime cannot be committed.

It is true that in the cited case, State v Kent, 22 Minn. 41, 21 Am. Rep. 764 (1875), the Supreme Court of Minnesota, so held. Aside from the unrealistic character of such a pronouncement, the legislature of Minnesota shortly thereafter nullified it by statute. Annotation, 13 L.R.A. (N.S.) 511, 512. The general rule, and we think the better one, appears to be to the contrary. Commonwealth v Jacobs, 126 Ky, 536, 104 S.W. 345 (Ct. of App. 1907); Annotation 13 L.R.A. (N.S. 511; 18 Am. Jur. Embezzelement, #11; 2 Wharton, Criminal Law (12th Ed. 1932) 1932) 1627 #1316.

Furthermore, the management contract here provides that:

> "All rents and other income collected by the agent shall be deposited in a special bank account in the name of the owner, and shall not be mingled with the funds of the agent.***All rent and other income,***shall be deposited by the agent not later than the next banking day following the receipt thereof, and failure so to do shall constitute a breach of this agreement."
>
> ***
>
> "Article IV (c)
> "The owner agrees to pay the agent five percent of the gross collections for leasing and management during the period provided herein, less commissions on any rents, concessions or rebates paid to tenants.***" (emphasis ours).

The record presented to us is not clear as to how the 5% commission was paid to defendant. There is nothing in the agreement indicating that Bobbins had authority to draw checks on the rent account. The plain indication from the language used is that he would be compensated by the owner. Whether a practice had grown up under which Bobbins in some way deducted his commission before depositing the rents is not disclosed by the appendix.

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But it is clear that rents totaling $100,244.59 were never deposited at all in the corporate account. That entire sum, which included $11,489.15 of commissions, was put to his own use. The balance above the commissions he held as an agent for the corporation and he was duty bound to deposit it as agreed. Wilful and fraudulent conversion thereof to his own use would constitute embezzelment. Commonwealth v Jacobs, supra.

A number of errors in the conduct of the trial are asserted. Some of them we shall discuss.

When Miller produced the letter of early March from defendant explaining the shortsges in the rent account and enclosing a copy of a letter claimed to have been sent to the delinquent tenants, he was permitted to testify that after talks with some of the tenants he felt that it was never sent; the tenants never received it; there were no rent arrearages. Although hearsay statementments were thus permitted, in our judgment no prejudicial error resulted. The defendant admitted that he had collected the rents involved and the fact of his shortage. And there was an abundance of other proof introduced showing that the tenants were not deliquent.

Further in connection with this letter of March 4 defendant undertook to testify that it was dictated by Miller himself in order to assist him in collecting from Bobbins' bonding company. An objection by the State was sustained. This might have constituted error of substantial proportion. But the proof shows that defendant testified to the very matter on cross examination by the State.

Again defendant complains of the admission of the testimony that Miller called him a thief-even though he made no answer. The proof was clearly proper. State v Toohey, 6 N.J.L. Super. 97 (App. Div. 1950); Donnelly v State, 26 N.J.L. 601,612 (E & A 1857).

Error is assigned because of the failure of the court to grant a mistrial or to instruct the jury to disregard certain re-

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attended some of the conferences in connection with the shortages was asked whether Bobbins had given any account of the deficit other than that it was a mistake and that the tenants were in arrears. After answering in the negative, he added a statement to the effect that the first time he ever heard the claim that the deficit represented a loan was in court when defendant's counsel opened to the jury. While the volunteerd information was not strictly responsive to the question, in view of the testimony as to defendant's attitude at the various conferences, we fail to discern any manifest prejudice suffered by him or any mistaken abuse of discretion by the trial court in ignoring the matter.

The other errors assigned relating to admission and rejection of proof and the alleged undue limitation of the cross examination of Miller have been considered. They require no specific discussion. It is sufficient to say that they present no basis for reversal. The same is true with respect to the requests to charge which were denied. Our examination of them has led us to the conclusion that their substance was included either in the main charge of the court or in other requests of the defendant which were in fact charged.

The judgment of conviction is affirmed.

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SUPREME COURT OF NEW JERSEY
No. A. 120 September Term 1955

THE STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

SAMUEL BOBBINS,

Defendant-Appellant.

Argued March 26, 1956. Decided. Filed April 23,1956.

On Appeal from Superi or Court, Appellate Division, whose opinion is reported in 35 N.J. Super.494.

Mr. Louis I. Kravitz argued the cause for the Defendant-Appelant.

Mr. David R. Brone, argued the cause for the Plaintiff-Respondent. Mr. Lewis P. Scott, Atlantic County Prosecutor, Attorney.

PER CURIAM

The defendant Bobbins was convicted of embezzlement under NN.J.S. 2A:102-5 in the Superior Court, Law Division, Atlantic County. The conviction was affirmed on appeal to the Superior Court, Appellate Division. STATE v BOBBINS, 35 N.J. Super. 494 (1955).

Thereafter the defendant moved before this court to pursue an appeal in forma pauperis, asserting that constitutional questions were presented in the interpretation accorded N.J.S. 2A:102-5 by the Appellate Division. We granted this motion and subsequently remanded the cause upon defendant's request to introduce newly discovered evidence before the trial court.

Upon reman defendant moved to arrest judgment, R.R.3:7-12, on the basis that N.J.S. 2A:102-5, which became effective on January 1, 1952, failed to render his conduct criminal during the preceding month of December, 1951, and if otherwise construed the statute constituted an ex post facto law. (The indictment charged a period of embezzlement extending from December 1, 1951 to May 5, 1953). Defendant

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also moved for a new trial based upon newly discovered evidence. R.R. 3:7-11(a). Both motions were denied by the trial court.

The judgment of the Superior Court, Appellate Division is affirmed, for the reasons stated in the opinion of Judge Francis. STATE v BOBBINS, supra.

We find no error in the denial of the two motions presented to the trial court upon remand. N.J.S. 2A:102-5 constitutes a part of the 1951 revision of Title 2 of the revised statutes which became effective on January 1, 1952, L. 1951, c. 344, sec. 12. R.S. 2:124-11 which the present statute supercedes, was in effect in December 1951, and proscribed the acts which the jury found defendant had committed. Therefore there can be no merit in the contention that N.J.S. 2A:102-5 renders criminal any conduct which had previously been considered innocent so far as the case sub judice is concerned. Defendant has shown no prejudice because the indictment did not charge a violation of R.S. 2:124-11. See R.R. 3:4-3(a) State v LVera, 35 N.J. Super. 256, 258-59 (App. Div. 1955). cert. den. 350 U.S. 853, 100 L. Ed.64 (Advance Reports) (1955). The evidence proffered to the trial court to support the motion for a new trial was inadequate to meet the standards laid down in State v Bunk, 4 N.J. 482, 486 (1950); State v Vaszerich, 13 N.J. 99, 130 (1953); State v Haines, 20 N.J.438 (1956). Although it has been carefully considered in conjunction with a studied review of the entire record we must conclude that it is either not material or not relavant to the main issue, or is not of the character which would probably change the result if a new trial were granted.

The judgment of the Superior Court, Appellate Division, is affirmed as well as te denial of the two motions presented to the trial court on the remand.

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APPENDIX C

INDICTMENT

Atlantic County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Atlantic, upon their oath present that SAMUEL BOBINSKY, also known as SAMUEL BOBBINS, on divers days between the 1st day of December, 1951, and the 5th day of May, 1953, at the City of Atlantic City, in the County of Atlantic aforesaid and within the jurisdiction of this Court, being the agent of Mayfair Apartments, Inc. a corporation of the State of New Jersey, his principal, and as such agent entrusted with the care and collection of rent moneys and payments due to such corporation, and having as such agent received, collected and obtained from tenants of said corporation the sum of Eighty-eight Thousand Seven Hundred Eighty-five Dollars, and Forty-four Cents ($88,785.44). The property of the said Mayfair Apartments, Inc. corporation as aforesaid, did wilfully, unlawfully and feloniously retain and appropriate to his own use the said sum of money aforesaid, knowing the same to belong to the said Mayfair Apartments, Inc. corporation as aforesaid with intent to defraud the said Mayfair Apartments, Inc., as aforesaid, contrary to the provisions of the N.J.S. 2A:102-5, against the peace of this State, the government and dignity of the same.

/s/ LEWIS P. SCOTT

County Prosecutor.

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APPENDIX D

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS APPEAL

N.J.S. 2A:102-5 reads: N.J. Laws 1951 c.344-

EMBEZZLEMENT BY EMPLOYEES, AGENTS, CONSIGNEES, FACTOR, BAILEE, LODGER OR TENANT.

"An employee, agent, consignee, factor, bailee, lodger or tenant, who embezzles or, with intent to defraud, takes money or receives, retains or appropriates to his own use or the use of another any property or the proceeds of the sale of the same, or any part thereof, belonging to his employer, principal, consignor, bailor or landlord is guilty of a misdemeanor."

Parg. 4 of the enactment says:

"4. Title 2 of the Revised Statutes, as amended and supplemented, is repealed, but such repeal shall not affect any right now vested in any person pursuant to the provisions of said title, nor any remedy where an action or proceeding thereunder has heretofore been instituted and is pending on the effective date of said repeal."

and

Parg. 5 of the enactment says:

"5. The said repeal of Title 2 of the Revised Statutes, as amended and supplemented, shall not of itself be deemed to revive any common law, right, or remedy abolished by any provision of the said title."

N.J.Constitution, Art 4, #7, par. 3 reads:

"The Legislature shall not pass any bill of attainder, ex post facto law,****"

UNITED STATES CONSTITUTION, Art. I Sec. 10 par. 2 reads:

"No States shall * * * pass any Bill of Attainder, ex post facto law, or Law impairing the obligation of contracts,****"

NEW JERSEY LAWS 1953 c. 4 p. 18- Words & Phrases:

The word property shall be deemed to embrace "money".

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION:

Sec. 1-"**Nor shall any State deprive any person of life, liberty, or property, without due process of law;***".

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OCT 16 1956
JOHN T. FEY, Clerk

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1956

- -

No. 400

- -

SAMUEL BOBBINS,

Appellant,

v.

THE STATE OF NEW JERSEY,

Appellee.

- -

Appeal from the Supreme Court of

New Jersey

- -

MOTION BY APPELLEE TO DISMISS APPEAL OR TO AFFIRM JUDGMENT

- -

LEWIS P. SCOTT,
Atlantic County, New Jersey
Prosecutor
Attorney for Appellee
741 Guarantee Trust Building
Atlantic City, New Jersey

DAVID R. BRONE
First Assistant Prosecutor
Of Counsel
741 Guarantee Trust Building
Atlantic City, New Jersey

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SUPREME COURT OF THE UNITED STATES

In the

JOHN T. FEY, CLERK

OCT 10 1958

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1956

- -

No. 400

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SAMUEL BOBBINS,

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THE STATE OF NEW JERSEY,

Appellee.

- -

Appeal from the Supreme Court of the

State of New Jersey

- -

MOTION BY APPELLEE TO DISMISS APPEAL

OR TO AFFIRM JUDGMENT

- -

MAY IT PLEASE THE COURT:

Now comes the State of New Jersey, Appellee, by their Attorneys, Lewis P. Scott and David R. Brone, and move that the appeal in the above entitled cause be dismissed or, in the alternative, that the judgment of the Supreme Court of New Jersey be affirmed, for the reason that the Federal

question is not substantial, and the Act under which the defendant was convicted is not Ex Post Facto.

Initially, it should be pointed out that the Appellee did not become aware of the actual filing of Appellant's Appeal to this Honorable Court until September 12, 1956, upon making an inquiry at the Clerk's office; and it was then learned that Appellant had filed its Jurisdictional Statement and Appeal with the Clerk on September 10, 1956. The Appellant had apparently served its Appeal on a Deputy Attorney General of New Jersey, whose acknowledgment bears date of September 10, 1956.

But the Rules, (Part VIII, Par. 1), require that service be made on counsel of record, and none other. Nevertheless, the Appellee waives this defection, and prefers to move its motion on the merits, although until now it has never been served with a copy of the Appellant's Statement. A copy was obtained from the office of the Clerk of this Court.

I.

No Substantial Federal Question Is Involved.

The New Jersey Supreme Court, in its Opinion, (Appellant's Jurisdictional Statement, p. 23), with respect to the evidence developed in support of a motion for a new trial on alleged newly discovered evidence, made this observation:

" - - -The evidence proferred to the trial court

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to support the motion for a new trial was inadequate to meet the standards laid down in State v. Bunk, 4 N.J. 482, 486 (1950); State v. Vasorich, 13 N.J. 99, 130 (1953); State v. Haines, 20 N.J. 438 (1956). Although it has been carefully considered in conjunction with a studied review of the entire record, we must conclude that it is either not material or not relevant to the main issue, or is not of the character which would probably change the result if a new trial were granted. - - -"

"The construction by a State Court of the statutes of that State and its rulings as to the admissibility of evidence furnish no basis for a Writ of Error." (Los Angeles Farming, etc. Co. vs. Los Angeles, Cal. 1910, S. Ct. 452, 217 U.S. 217, 54 L. Ed. 736)

While it is conceded that the United States Supreme Court may re-examine the evidenciary basis of conviction in the State Court to determine whether the claimed invasion of Federal rights did occur improperly, (Young vs. Ragen, Ill. 1949, 69 S. Ct. 1073, 337 U.S. 235, 93 L. Ed. 1333), yet the evidence in the case at bar was so ample to sustain the conviction, that the appellant's approach via the Fourteenth Amendment, could hardly be said to involve "a substantial federal question."

The New Jersey Appellate Division in its opinion noted (35 N.J. Super. 494, Appellant's Appendix A, p. 18):

" - - -Likewise it is equally plain that the verdict of the jury was not contrary to the weight of the evidence. The record reveals more than ample evidence to justify the conclusion. - - -"

The Appellee submits that the Appellant was proven guilty, beyond a reasonable doubt, by the most clear, explicit, and convincing evidence; that the Appellant has suffered no denial of his constitutional rights under the Fourteenth Amendment, having to do with the nature and quality of the evidence, either admitted, partially or wholly, or rejected. There is no substantial Federal Question involved, (without considering for the moment the statute involving the indictment,) which would justify a review.

"If there is any evidence, viewing it most favorably to Government, to support verdict against accused, conviction must be affirmed." (U.S. vs. Schachtrup, C. C. A. Ill. 1944, 140 Fed. 2d 415.)

II.

The Defendant Was Not Convicted Under An Ex Post Facto Law, As Alleged.

Appellant's conviction under N.J.S. 2A:102-5 (Appellant's Appendix C, p. 24, Appendix D, P. 25) covered a continuous period of defalcations from Dec. 1, 1951, to May 5, 1953. Indeed, it is true that for the thirty-day period between Dec. 1, 1951, and Dec. 31, 1951, the

Appellant, in effect, was being prosecuted as if under R.S. 2:124-11, which proscribed the acts for which the Appellant was convicted. The successor act, (N.J.S. 2A:102-5), became effective on Jan. 1, 1952. (Appellant's Appendix B, p. 23). The Supreme Court of New Jersey made a telling point when it observed that: " - - -there can be no merit in the contention that N.J.S. 2A:102-5 renders criminal any conduct which had previously been considered innocent so far as the case subjudice is concerned. Defendant has shown no prejudice because the indictment did not charge a violation of R.S. 2:124:11 - - -" (Appellant's Appendix B, p. 23).

In Morgan vs. Commonwealth, 1900, 35 S.E. 448, 98 Va. 812, in an almost identical situation as this, it was held that where the indictment charged that the accused committed an act forbidden by a statute, before as well as after its effective date, yet nevertheless, the statute under which the indictment was found was not an Ex Post Facto law. The error, if any, did not prejudice the defendant.

People ex rel. Pincus vs. Adams, 1937, 9 N.E. 2nd 46, 274 N.Y. 447, 110 A.L.R. 1303, rejected the Ex Post Facto principle in a case where the New York Criminal Code permitted the People to consolidate into one indictment crimes of a similar nature, or dissimilar crimes constituting part of a common scheme or pattern, even though

the acts of the wrongdoer were committed prior to the enactment of the statute.

And, in U.S. v. Goldberger, (197 Fed. 2nd 330, certiorari denied, 73 S. Ct. 40, 344 U.S. 833, 97 L. Ed. 648), the Court held that admitted successive overt acts occurring after a statute increasing the penalty for conspiracy became law, were part of a continuing crime for which the defendants were indicted and convicted, and therefore the statute was not an ex post facto law as applied to a conspiracy which was commenced before the effective date of the statute, but was continued by overt acts after its effective date. So, in the instant case, the Appellant's transgressions continued regularly, not alone for the one month period before the statute's effective date, but with regularity, each month, until May, 1953.

From Calder v. Bull, (3 Dall, U.S. 386, 1 L. Ed. 648, (1796)), to Andrus vs. McCauley, (D.C. Wash. 1937, 21 F. Supp. 70) the Federal bench has uniformly ruled that, (in the aspect of ex post facto with which we are here concerned,) the State statute must impose punishment for an act which was not permissible when it was committed. In the thirty day period between December 1, 1951, and Dec. 31, 1951, the appellant's embezzlements were indeed punishable under R.S. 2:124:11, part of a series of separate embezzlement statutes

which became consolidated by the present N.J.S. 2A:102-5 on January 1, 1952.

CONCLUSION

Since no substantial federal question is involved either in the admitted or rejected evidence at the trial or on the motion for new trial, worthy of consideration under the due process clause of the Fourteenth Amendment; and since the act under which appellant was convicted was not ex post facto, and thus did not offend against the Fourteenth Amendment, the appeal should be dismissed or, in the alternative, the judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

Lewis P. Scott

LEWIS P. SCOTT
Attorney for Appellee

David H. Brone

DAVID H. BRONE
Of Counsel

(Emphasis Supplied)

October 8, 1956.